

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

YAGEO AMERICA CORP.,

Plaintiff,

v.

FAN-CHU TSENG, *et al.*,

Defendants.

Case No. C06-0227RSL

ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS OR TO  
TRANSFER

This matter comes before the Court on a motion to dismiss for improper venue filed by defendants Fan-Chu Tseng ("Mr. Tseng"), Fong-Lan Tseng and their marital community ("the Tsengs"). Dkt. # 7. Plaintiff Yageo America Corp. ("Yageo") alleges that Mr. Tseng, its former employee, downloaded Yageo trade secret information and used that information to compete with Yageo.

**I. BACKGROUND FACTS**

Yageo filed a complaint against the Tsengs in King County Superior Court on January 26, 2006, alleging misappropriation of trade secrets. Defendants removed the action to this Court on February 16, 2006. Dkt. # 1.

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1 Yageo's headquarters are located in Washington. Mr. Tseng, who resides in  
2 Texas, worked for Yageo until September 30, 2005. At times he traveled to Washington  
3 for reasons related to his employment.

## 4 II. DISCUSSION

### 5 A. Proper Venue

6 Defendants' motion argues that dismissal is warranted pursuant to 28 U.S.C. §  
7 1406 because venue is improper under 28 U.S.C. § 1391. Their reply brief, however,  
8 requests transfer under 28 U.S.C. § 1406 or § 1404.

9 As plaintiff points out in the response (Response at p. 2) and defendants  
10 acknowledge in the reply (Reply at p. 1), "on the question of venue, § 1391 has no  
11 application to this case because this is a removed action." Polizzi v. Cowles Magazines,  
12 Inc., 345 U.S. 663, 665 (1953). In a removed action, venue is proper in the district  
13 "embracing the place where such action is pending." 28 U.S.C. § 1441. The Western  
14 District of Washington "embraces" King County. A district court acquires venue through  
15 defendants' voluntary removal to federal court, regardless of whether venue would have  
16 been proper had the case originally been filed in that court. Seaboard Rice Milling Co. v.  
17 Chicago, R.I. & P. Ry. Co., 270 U.S. 363, 367 (1926). Thus venue is proper in this  
18 Court, and § 1406, which governs in "a case laying venue in the wrong division or  
19 district[,] " does not apply.

### 20 B. Transfer of Venue

21 Defendants' removal did not waive the right to request a discretionary transfer to a  
22 more convenient venue under 28 U.S.C. § 1404(a). PT United Can Co. Ltd. v. Crown  
23 Cork & Seal Co., Inc., 138 F.3d 65 (2d Cir. 1998). However, the request for transfer was  
24 not mentioned in the original motion. Ordinarily, the Court will not consider issues

1 raised for the first time in a reply brief. District courts in this Circuit have ruled that “it is  
2 improper for a party to raise a new argument in a reply brief[,]” largely because the  
3 opposing party may be deprived of an opportunity to respond. United States v. Boyce,  
4 148 F.Supp.2d 1069, 1085 (2001). However, a “district court ha[s] discretion to consider  
5 [an] issue even if it was raised in a reply brief.” Glenn K. Jackson Inc. v. Roe, 273 F.3d  
6 1192, 1202 (9th Cir. 2001). In particular, a surreply filed by the non-moving party may  
7 afford an adequate opportunity to respond. Cedars-Sinai Medical Center v. Shalala, 177  
8 F.3d 1126, 1129 (9th Cir. 1999). Because both sides have addressed the request for  
9 transfer under § 1404, the Court will consider it.<sup>1</sup>

10 Defendants request that this case be transferred to the Northern District of Texas  
11 pursuant to 28 U.S.C. § 1404(a), which provides: “For the convenience of parties and  
12 witnesses, in the interest of justice, a district court may transfer any civil action to any  
13 other district or division where it might have been brought.” Defendants have the burden  
14 of showing that the overall convenience of parties and witnesses weighs in favor of  
15 transferring the above-captioned case to the United States District Court for the Northern  
16 District of Texas. Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843  
17 (9th Cir. 1986).

18 The central focus of a § 1404 inquiry is convenience. The Court must make an  
19 individualized, case-by-case determination of convenience and fairness when considering  
20 a change in venue. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988). Factors  
21 that may be considered include “(1) the location where the relevant agreements were  
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23 <sup>1</sup> Because defendants’ reply brief raised new issues not addressed in the original  
24 motion, the plaintiff’s motion to file an overlength surreply to address the new arguments  
25 is hereby GRANTED. Dkt. #12.

1 negotiated and executed, (2) the state that is most familiar with the governing law, (3) the  
2 plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the  
3 contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences  
4 in the costs of litigation in the two forums, (7) the availability of compulsory process to  
5 compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources  
6 of proof." Jones v. GNC Franchising Inc., 211 F.3d 495, 498-99 (9th Cir. 2000).

7 On the basis of the record presented, more factors favor Washington than favor  
8 Texas. The first and seventh factors are neutral, as neither party identifies any relevant  
9 agreements or unwilling witnesses. The second factor weighs in favor of Washington, as  
10 the complaint alleges violation of Washington's Trade Secrets Act. The third factor  
11 strongly favors Washington. The fourth factor slightly favors Washington. While Mr.  
12 Tseng had substantial contacts with Texas, both parties had substantial contacts with  
13 Washington. Yageo is headquartered here, and Mr. Tseng traveled to Washington  
14 regularly when employed by Yageo. Motion at p. 2; Surreply at p. 2.

15 The fifth factor, examining the relationship between the forum and the cause of  
16 action, is more mixed. The parties dispute where the alleged misappropriation took place.  
17 Defendants claim it could only have occurred in Texas. Motion at p. 3; Reply at p. 6.  
18 Plaintiff implies that it could have taken place in any of the states to which Mr. Tseng  
19 traveled. Surreply at p. 6. Plaintiff's contention weighs against Texas but not in favor of  
20 Washington. Overall, the fifth factor tilts slightly toward Texas.

21 The sixth and eighth factors may be considered together, as both reflect the ease of  
22 investigation and discovery. Plaintiff points to specific witnesses located in Washington,  
23 while Mr. Tseng is apparently the only witness located in Texas. *Id.* at p. 2. Plaintiff  
24 also identifies witnesses located in Taiwan, who could travel more easily to Washington

1 than to Texas. *Id.* Defendants state that all customers Mr. Tseng has called on since  
2 leaving Yageo are outside Washington. Motion at p. 2. If those customers are potential  
3 witnesses, their location might weigh against Washington but not in favor of Texas.  
4 Defendants also state that the four computer and storage devices Mr. Tseng used while  
5 employed by Yageo were returned to Yageo's Texas office. *Id.* at p. 3. If these potential  
6 sources of proof remain in Texas, access to them might be easier in Texas. Overall,  
7 because evidence is generally easier to transport than people, factors six and eight weigh  
8 slightly in favor of Washington.

9 Five factors weigh in favor of Washington as the more convenient forum, two are  
10 neutral, and one favors Texas. "[U]nless the balance of factors is strongly in favor of the  
11 defendants, the plaintiff's choice of forum should rarely be disturbed." Securities Investor  
12 Protection Corp. v. Vigman, 764 F.2d 1309 (9th Cir. 1985). The Court finds that  
13 defendants have not shown that the overall convenience of parties and witnesses, in the  
14 interest of justice, weighs in favor of transferring the above-captioned case to the  
15 Northern District of Texas.

### 16 III. CONCLUSION

17 For the reasons discussed above, the Court finds that the Western District of  
18 Washington is a proper venue for the above-captioned case. Accordingly, defendants'  
19 motion to dismiss or transfer for improper venue under 28 U.S.C. § 1406(a) is DENIED.

1 Dkt. # 7. Furthermore, defendants' request for transfer under 28 U.S.C. § 1404(a) is  
2 DENIED.

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4 DATED this 21st day of April, 2006.

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8 Robert S. Lasnik  
9 United States District Judge  
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